

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KING MOUNTAIN TOBACCO COMPANY,)	
INC.; CONFEDERATED TRIBES AND)	NO. CV-11-3018-LRS
BANDS OF THE YAKAMA NATION,)	
)	ORDER RE SUMMARY JUDGMENT
Plaintiffs,)	MOTIONS
)	
-vs-)	
)	
ROBERT McKENNA, ATTORNEY GENERAL)	
OF THE STATE OF WASHINGTON,)	
)	
Defendant.)	
)	

BEFORE THE COURT are the cross-motions for summary judgment filed by the parties on November 9, 2012: Plaintiffs' Motion for Summary Judgment (ECF No. 85); Defendant's Motion for Summary Judgment (ECF No. 90); and other miscellaneous motions. Oral argument was held on February 11, 2013, and at the conclusion, the motions were taken under advisement.

I. BACKGROUND AND FACTS

This declaratory judgment and injunctive relief action is brought by the Plaintiffs against the Washington Attorney General based on allegations of systematic and continuous violations of: (i) the Treaty of 1855 between the United States and the Confederated Tribes and Bands

1 of the Yakama Nation; (ii) federal laws; and (iii) tribal laws of the
2 Confederated Tribes and Bands of the Yakama Nation. Plaintiff King
3 Mountain is a tobacco product manufacturer, owned by Delbert Wheeler, a
4 Yakama Nation member.

5 In the mid-1990s, Washington and several other states sued cigarette
6 manufacturers, seeking to protect public health and recover costs and
7 other damages incurred by the states due to smoking-related illnesses.
8 In 1998, the States' Attorneys General Litigation against the major
9 tobacco companies resulted in The Master Settlement Agreement ("MSA")
10 between 46 states and tobacco product manufacturers ("Original
11 Participating Manufacturers" or "OPM"). Pursuant to the MSA, the OPMs
12 obtained release of specified past and future tobacco-related claims
13 against them in exchange for an agreement to make substantial annual cash
14 payments to the states in perpetuity to offset the burden that their
15 cigarettes impose or will impose on the public health system. The
16 payments from the OPMs are designed to compensate the states for expenses
17 they incur as the payers of last resort for health care costs of citizens
18 who suffer smoking-related illnesses.
19

20 The MSA carves out three different groups of manufacturers: the
21 OPM, Subsequent Participating Manufacturers, and Non-Participating
22 Manufacturers ("NPM"). The Washington Legislature, like the legislatures
23 of the other settling states, adopted a Qualifying Statute. See Wash.
24 Rev. Code § 70.157.005. In its findings, the Legislature expressly
25 recognized the need to establish a reserve fund to cover the potential
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1 liability of NPMs. Washington's Qualifying Statute requires all NPMs to
2 make payments into qualified escrow accounts or join the MSA. The
3 Qualifying Statute, therefore, requires tobacco product manufacturer
4 Plaintiff King Mountain Tobacco, an NPM, to either join the MSA or
5 deposit funds into escrow, based on the amount of their cigarette sales,
6 that the State would obtain access to in the event of a future settlement
7 or judgment against King Mountain. NPMs, who do not join the MSA, are
8 required to make escrow payments for only those cigarettes or
9 roll-your-own containers that are subject to Washington's cigarette tax,
10 Wash. Rev. Code § 70.157.010(j)-.020(b).
11

12 From the Plaintiffs' perspective, the MSA resulted in the enactment
13 of the Washington State Escrow Statutes ("escrow statutes"), which place
14 economic restrictions and preconditions on the ability of NPMs to
15 participate in the tobacco product market. From the Defendant's
16 perspective, the escrow requirement works differently than the State's
17 cigarette taxes. The State obtains access to escrow funds only under
18 certain conditions; otherwise, the funds revert to the tobacco product
19 manufacturer. The financial institution holding the escrow funds may
20 release the funds only (1) to pay a judgment or settlement of a
21 qualifying claim (i.e., state or consumer sues manufacturer for damages
22 due to smoking), (2) to reimburse the manufacturer for amounts above what
23 the NPM would have had to pay had it been a Participating Manufacturer,
24 or (3) to return the escrow funds to the manufacturer 25 years after they
25 were placed into the escrow fund. Wash. Rev. Code § 70.157.020(2). In
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1 addition, the manufacturer receives any interest earned on the account
2 on an ongoing basis.

3 The Washington Attorney General enforces the escrow statutes and
4 must bring a civil action against any NPM that fails to certify
5 compliance with the statute. Wash. Rev. Code § 70.157.020(3). Upon a
6 finding of a second knowing violation of the Qualifying Statute, a court
7 may prohibit the manufacturer from selling cigarettes in Washington
8 (either directly or through a distributor) for a period of two years.

9 Plaintiff King Mountain engages in a multistate business growing
10 tobacco and manufacturing cigarettes and roll-your-own tobacco. The
11 business involves (1) shipping King Mountain tobacco to Tennessee, where
12 it is threshed, (2) shipping tobacco to North Carolina, where King
13 Mountain tobacco is blended with North Carolina grown (Alliance One)
14 tobacco, (3) transporting the blended tobacco on its trucks from North
15 Carolina back to Washington, (4) advertising its cigarettes in multiple
16 states through trade shows and the Internet, and (5) selling its
17 cigarettes (through a distributor) to retail stores throughout Washington
18 (and multiple other states) that ultimately sell cigarettes to consumers.
19 ECF No. 95.
20

21 In 2009, approximately 3.1% of the tobacco used in the resulting
22 cigarettes was grown on reservation land while the rest was purchased
23 from Alliance One. *Id.* In 2010, the amount of King Mountain tobacco was
24 9.5%, and in 2011, 37.9%. *Id.* King Mountain pays Alliance One by the
25 pound for the blended tobacco. *Id.* With the exception of a subsequent
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1 Native American ceremony to preserve the sacred character of King
2 Mountains' tobacco products, also referred to as "blending," all the
3 blending of King Mountain and Alliance tobacco occurs in North Carolina.
4 *Id.*

5 King Mountain and its distributor, Mountain Tobacco, sell the
6 cigarettes to distributors throughout Washington and in approximately 16
7 other states. *Id.* For non-reservation distributors throughout
8 Washington, King Mountain provides those cigarettes to Mountain Tobacco,
9 which then delivers the cigarettes. *Id.* King Mountain delivers
10 cigarettes directly to reservation retailers. *Id.* King Mountain
11 advertises its products at trade shows in multiple states, as well as
12 through the Internet. *Id.*

14 The Yakama Nation and National Congress of American Indians have
15 taken the position that King Mountain is not subject to the requirements
16 of the Washington escrow statutes. After certifying its escrow
17 obligation in 2007, and generally complying with the escrow requirement
18 for several years under the Qualifying and Complementary Statutes, King
19 Mountain now denies its obligations under State law. The present lawsuit
20 was commenced when the State failed to acknowledge that the economic
21 restrictions and preconditions imposed by the Washington State escrow
22 statutes violate established 1855 Yakama Treaty Rights ("Treaty").

23 **II. PLAINTIFF'S MOTION TO STRIKE** (ECF No. 74)
24

25 Plaintiff moves to strike reports and exclude testimony of Emily
26 Greenwald (ECF No. 74), which motion was filed on November 9, 2012 but

1 deferred by the Court on January 25, 2013 (ECF No. 139). Plaintiffs
2 argued that Dr. Greenwald's opinions on Article III of the Treaty are
3 barred by the doctrine of collateral estoppel, and are irrelevant,
4 unreliable, and inadmissible. Plaintiffs further argued that Defendant's
5 expert, Dr. Greenwald, Ph.D., is not qualified to opine on the issues
6 addressed in her reports.

7
8 Defendant did not use or rely on the testimony of Dr. Greenwald for
9 purposes of its summary judgment motion. The Court, therefore, denies
10 Plaintiffs' motion to strike as moot.

11 **III. DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' NEW LEGAL THEORY AND**
12 **RELATED FACTUAL SUBMISSIONS** (ECF No. 107)

13 Defendant argues that Plaintiffs improperly raised a new claim of
14 relief, which was not in their First Amended Complaint, in support of
15 their motion for summary judgment. Defendant states that Plaintiffs'
16 complaint asserts only two claims and both rely on the Treaty and other
17 unspecified federal law. Defendant argues that during the summary
18 judgment motion, Plaintiffs expanded on their argument. Specifically,
19 Plaintiffs explained in the summary judgment that because the Washington
20 Department of Revenue defined certain King Mountain sales as tax exempt,
21 those sales were not "units sold" within the definition set forth in Rev.
22 Code Wash. §70.157.010(j). Plaintiffs concluded that in addition to the
23 Treaty protections exempting King Mountain from State escrow obligations,
24 it is also exempt from State escrow obligations for its on-reservation
25 sales based on the State's determination that these sales are not
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1 taxable.

2 The Court finds that although the Plaintiffs' First Amended
3 Complaint sets forth claims that rely on the Treaty and other federal
4 law, the information about state tax-exempt products at issue is relevant
5 and tied into the Plaintiffs' lawsuit. Plaintiffs, however, have not
6 offered evidence relating to verifiable state tax-exempt sales for which
7 King Mountain has deposited money into escrow for, as "units sold," that
8 would or should be segregated from the other indirect sales at issue in
9 this lawsuit nor has timely discovery apparently occurred on this issue.
10 Therefore, the motion to strike is granted, in part.

11 **IV. APPLICABLE LAW**

12 Summary judgment is appropriate "if the movant shows that there is
13 no genuine dispute as to any material fact and the movant is entitled to
14 judgment as a matter of law." Fed. R. Civ. P. 56(a). A key purpose of
15 summary judgment "is to isolate and dispose of factually unsupported
16 claims" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).
17 Summary judgment is "not a disfavored procedural shortcut," but is
18 instead the "principal tool[] by which factually insufficient claims or
19 defenses [can] be isolated and prevented from going to trial with the
20 attendant unwarranted consumption of public and private resources."
21 *Celotex*, 477 U.S. at 327.

22 The moving party bears the initial burden of demonstrating the
23 absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at
24 323. The moving party must demonstrate to the Court that there is an
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1 absence of evidence to support the non-moving party's case. See *Celotex*
2 *Corp.*, 477 U.S. at 325. The burden then shifts to the non-moving party
3 to "set out 'specific facts showing a genuine issue for trial.'" *Celotex*
4 *Corp.*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

5 A genuine issue of material fact exists if sufficient evidence
6 supports the claimed factual dispute, requiring "a jury or judge to
7 resolve the parties' differing versions of the truth at trial." *T.W.*
8 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th
9 Cir.1987). At summary judgment, the court draws all reasonable inferences
10 in favor of the nonmoving party. *Dzung Chu v. Oracle Corp. (In re Oracle*
11 *Corp. Secs. Litig.)*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson*
12 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). The evidence presented
13 by both the moving and non-moving parties must be admissible. Fed. R.
14 Civ. P. 56(e). The court will not presume missing facts, and non-specific
15 facts in affidavits are not sufficient to support or undermine a claim.
16 *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).
17

18 19 **V. CROSS-SUMMARY JUDGMENT MOTIONS**

20 Plaintiffs assert that King Mountain is engaged in the trade of
21 farming, cultivating, and trading tobacco just as the Yakamas have been
22 for centuries. The MSA resulted in the enactment of the State escrow
23 statutes, which Plaintiffs complain place economic restrictions and
24 preconditions on the ability of King Mountain, an NPM, to participate in
25 the market. Further, Plaintiffs conclude, the economic restrictions and
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1 preconditions imposed by the State escrow statutes violate established
2 Treaty rights.

3 **A. Treaty - Articles II and III**

4 The first argument raised by Plaintiffs for why King Mountain should
5 not be required to comply with the State escrow statutes is that King
6 Mountain is exempt from such escrow payments under the Treaty of 1855,
7 12 Stat. 951. Article II of the Treaty describes the land that was
8 reserved to the Yakama Nation and stated that the "tract shall be set
9 apart and, so far as necessary, surveyed and marked out, *for the*
10 *exclusive use and benefit* of said confederated tribes and bands of
11 Indians" *Id.* (emphasis added). Plaintiffs argue that the
12 language "for exclusive use and benefit" evidences an intent by the
13 United States to not restrict certain activities, including the
14 manufacturing of tobacco products and trade. Also, it was the Yakamas
15 understanding that Article II was a guarantee that they would always have
16 the "exclusive use and benefit" of the income from their lands.

17
18 The second argument advanced by Plaintiffs is that, as a matter of
19 law, the State escrow statutes are preconditions and economic
20 restrictions that violate Yakama members' Article III Trade and Travel
21 Rights. Article III of the Treaty of 1855 states, in pertinent part, as
22 follows:
23

24 And provided, that, if necessary for the public convenience,
25 roads may be run through the said reservation; and on the
26 other hand, the right of way, with free access from the same
to the nearest public highway, is secured to them; as also the
right, in common with citizens of the United States, to travel

1 upon all public highways.

2
3 Plaintiffs assert that the parties to the Treaty could not have
4 contemplated a State mandate that required Yakama people to surrender
5 revenue generated by them on Yakama land to be held and used for the
6 benefit of the state as a precondition to exercising their
7 Treaty-protected rights to trade in tobacco. To that end, Plaintiffs
8 reason, the Treaty's recognized broad protections secure King Mountain's
9 right to produce and sell its products in the State of Washington without
10 the encroachments imposed by the State escrow statutes.

11 Plaintiffs assert that the Ninth Circuit has expressly held that
12 Article III protects the Yakamas' right to travel and trade, without
13 restriction, with respect to tobacco products. *United States v. Smiskin*,
14 487 F.3d 1260, 1266-67 (9th Cir. 2007)("Thus, whether the goods at issue
15 are timber or tobacco products, the right to travel overlaps with the
16 right to trade under the Yakama Treaty such that excluding commercial
17 exchanges from its purview would effectively abrogate our decision in
18 Cree II and render the Right to Travel provision truly impotent.");
19 *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1248 (E.D. Wash.
20 1997)(holding that "the language of the Treaty, when viewed in the
21 historical context as the Yakamas would have understood it, unambiguously
22 reserves to the Yakamas the right to travel the public highways without
23 restriction for purposes of hauling goods to market"); *Cree v. Flores*,
24 157 F.3d 762, 769 (9th Cir. 1998)(affirming the *Flores* district court's
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1 finding that Article III "must be interpreted to guarantee the Yakamas
2 the right to transport goods to market over public highways without
3 payment of fees for use").

4 In further support of their arguments, Plaintiffs rely on *Smiskin*
5 which held that an Indian treaty "must be construed as the Indians would
6 naturally have understood it at the time of the treaty, with doubtful or
7 ambiguous expressions resolved in the Indians' favor." *United States v.*
8 *Smiskin*, 487 F.3d 1260,1264 (9th Cir. 2007). It is undisputed, Plaintiffs
9 argue, that before the time of the Treaty, the Yakama were "inveterate
10 traders." *Flores*, 955 F. Supp. at 1238.

11 In summary, Plaintiffs conclude that as a matter of fact and law,
12 there is no dispute-and Defendant has failed to rebut-that the Yakama
13 understood Article II of the Treaty to guarantee them the right to engage
14 in the historic practice of growing and trading tobacco without any
15 economic impediments, restrictions, or conditions being imposed by any
16 state or the federal government. This conclusion is based on: (1) the
17 historical significance of tobacco being grown by the Yakama and then
18 subsequently traded with other Yakama and non-Yakamas alike; (2) the
19 representations made by the United States representatives to the Yakama
20 at the time of the Treaty negotiations at the Walla Walla Council; and
21 (3) the language of the Treaty itself.
22

23 Defendant responds, in opposition to Plaintiffs' Treaty rights
24 arguments, that allowing the Yakamas to travel and use their land are not
25 express exemptions from nondiscriminatory Washington regulation of
26

1 tobacco products. Defendant states that Article II merely preserved the
2 physical land for the Indian reservation. King Mountain engages in an
3 expansive, multistate business growing tobacco and manufacturing
4 cigarettes and roll-your-own tobacco and the broad scope of Plaintiffs'
5 commercial enterprise takes this conduct out of the realm of mere
6 reservation activity. In other words, when taking into account the
7 manufacturing process involved and the amount of reservation-grown
8 tobacco that is used in King Mountain's products, Defendant asserts that
9 the cigarettes and roll-your-own tobacco produced by King Mountain are
10 not principally generated from the use of reservation land and resources.
11

12 Relying on *Mescalero*, Defendant asserts that King Mountain's claim
13 contradicts long-established law of the highest court that absent express
14 federal law to the contrary, Indians going beyond reservation boundaries
15 have generally been held subject to non-discriminatory state law
16 otherwise applicable to all citizens of the State. *Mescalero Apache*
17 *Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

18 Defendant points out that Plaintiffs' travel cases (*Smiskin*,
19 *Fiander*, *Ramsey*, *Cree*) are inapposite as none of those cases deal with
20 regulations similar to the escrow statutes that regulate the product
21 itself that is subject of commerce, rather than how such a product is
22 brought to market. Similarly, Defendant points out that because the
23 tobacco product manufacturer retains rights in its deposits and the money
24 is not transferred to the State except in the event of settlement or
25 judgment, the escrow requirement differs from a typical tax. Therefore,
26

1 the cases relied upon by Plaintiffs holding taxes are improper as to the
2 Indians are not applicable to the facts of this case.

3 Citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989),
4 which involved a non-Indian company that operated by way of an oil and
5 gas lease on land owned by the United States in trust for the Jicarilla
6 Tribe, Defendant argues the highest court held that the mere fact that
7 the state tax imposes some limit on the profitability of Indian oil and
8 gas leases was too indirect to reject state taxation. *Id.* at 191.
9 Defendant contends the argument made by Plaintiffs here is even weaker
10 than the argument made on behalf of Jicarilla Tribe because mineral
11 leases were the primary source of the Jicarilla Tribe's operating
12 revenues. King Mountain, although owned by a Yakama member, is a private
13 rather than a tribal enterprise.
14

15 In a similar vein, Defendant explains that Washington's escrow
16 statutes are not a "precondition" to King Mountain engaging in economic
17 activity. King Mountain need not comply with the escrow statute to grow
18 tobacco on its land. Rather, Washington law imposes non-discriminatory
19 requirements when King Mountain chooses to sell cigarettes to nonmembers
20 in Washington. The mere fact that the escrow requirement reduces profits
21 partially derived from reservation land is not enough to demonstrate
22 interference with the use and benefit of Yakama land. Defendant supports
23 this argument with the *Confederated Tribes of Colville Indian*
24 *Reservation*, 447 U.S. 134, 155 (1980) case.
25

26 Defendant also argues that tobacco products threaten public health

1 and are squarely within a State's police power to promote public health,
2 safety, welfare and morals. *Star Scientific, Inc. v. Beales*, 278 F.3d
3 339, 361 (8th Cir. 2002). As a tobacco product manufacturer, King
4 Mountain shares in its responsibility as it relates to the sale and
5 distribution of cigarettes in Washington. Defendant concludes that the
6 State has a legitimate and regulatory interest in ensuring that King
7 Mountain fulfills its obligation in Washington for the damages caused by
8 its product to non-members on and off the reservation.
9

10 **B. King Mountain Products Are State-Tax Exempt**

11 Plaintiffs assert that Washington State has acknowledged that King
12 Mountain products are state-tax exempt. Therefore, Plaintiffs conclude,
13 the sales of King Mountain products are not subject to State escrow
14 obligations.

15 Defendant disagrees as to the conclusion but concedes the Attorney
16 General recognizes that sales made on the Yakama reservation to Yakama
17 members or members of compact tribes are not subject to the State's
18 escrow requirements because the "units sold" definition includes only
19 sales subject to the state excise tax.¹

20 The Washington State Department of Revenue letter ruling relied on
21 by King Mountain expressly states that King Mountain must escrow for the
22 sales at issue in this lawsuit. In 2007, the Department of Revenue
23 provided King Mountain a letter ruling regarding which sales are subject
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25
26 ¹ECF No. 94 at 32, footnote 5.

1 to state excise taxes. ECF No. 36-5. The letter ruling states (subject
2 to certain conditions) that sales by King Mountain of cigarettes
3 manufactured and sold within the reservation are state tax exempt. But
4 the Department also clearly informed King Mountain that "subsequent sales
5 by purchasers" who are either non-Indian or non-member Indians either on
6 or off the reservation and the Yakama Tribe or a Yakama member for
7 selling activity taking place off the reservation were not tax exempt.
8 The same ruling also required compliance with applicable provisions of
9 the MSA. In sum, Defendant states the Department of Revenue letter
10 ruling exempts from state excise taxes certain direct sales by King
11 Mountain within the reservation, but does not exclude from state excise
12 tax those indirect "downstream" sales to Indians, non-Indians and Indian
13 tribal members.
14

15 VI. ANALYSIS

16 It is well-settled that a state can regulate (i) off-reservation
17 transactions conducted by native Americans; (ii) on-reservation sales to
18 persons other than Native Americans; and (iii) impose certain
19 requirements upon Native Americans in regulating those sales. *Omaha*
20 *Tribe of Nebraska v. Miller*, 311 F.Supp.2d 816, 826 (S.D. Iowa 2004)
21 (citations omitted). Courts have repeatedly held that the mere fact that
22 a regulation or tax decreases revenue for an Indian tribe does not mean
23 the regulation or tax interferes with sovereignty rights or the Indian
24 Commerce Clause. *State of Washington v. Confederated Tribes of Colville*
25 *Indian Reservation*, 447 U.S. 134, 156 (1980). Long-established Supreme
26

1 Court law provides that, "Absent express federal law to the contrary,
2 Indians going beyond reservation boundaries have generally been held
3 subject to non-discriminatory state law otherwise applicable to all
4 citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145,
5 148-49 (1973).

6 King Mountain's operations involve extensive off-reservation
7 activity. Uncontroverted evidence was presented that approximately 37.9%
8 of the tobacco used by King Mountain to manufacture its products was
9 grown on trust land in 2011, and approximately 9.5% in 2010, with the
10 balance of tobacco being purchased from a source in North Carolina. ECF
11 No. 95. King Mountain's business involves (1) shipping tobacco to
12 Tennessee, where it is threshed, (2) shipping tobacco to North Carolina,
13 where King Mountain tobacco is blended with Alliance One tobacco, (3)
14 transporting the blended tobacco on its trucks from North Carolina back
15 to Washington, (4) advertising its cigarettes in multiple states through
16 trade shows and the Internet, and (5) selling its cigarettes (through a
17 distributor) to retail stores throughout Washington (and multiple other
18 states) that ultimately sell cigarettes to consumers.

19
20 When taking into account the manufacturing process and the amount
21 of non-trust-land tobacco that is used in King Mountain's products, the
22 Court finds that the cigarettes and roll-your-own tobacco products
23 produced by King Mountain are not principally generated from the use of
24 reservation land and resources. In sum, the finished cigarettes and
25 roll-your-own tobacco are not directly derived from trust land. The
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1 principle in *Mescalero* applies to King Mountain. King Mountain has not
2 met its burden of showing express federal law exempting its business from
3 state regulation nor does it offer case authority invalidating
4 application of any state's escrow statute based on an Indian Treaty or
5 any other federal law.

6 As for King Mountain's claim that the Washington escrow statute
7 discriminates against it, the Court rejects this argument. The Court
8 finds the Washington escrow statutes are non-discriminatory state laws
9 of general application and apply to all NPMs, and not just to Indian
10 Tribes or tribal members. The escrow statutes' purpose is to impose the
11 financial burdens from costs associated with illness resulting from
12 cigarettes on tobacco product manufacturers rather than the states. See
13 Wash. Rev. Code § 70.157.010(d). This includes all tobacco product
14 manufacturers not participating in the MSA. The Court finds the Fourth
15 Circuit Court of Appeals' explanation in *Star Scientific, Inc. v. Beales*,
16 278 F.3d 339 (4th Cir. 2002) instructive. The appellate court explained
17 that the State's "decision to require nonparticipating manufacturers to
18 place funds in an escrow account is not 'invidious discrimination' or a
19 'wholly arbitrary act.' Rather, it is a rational system for assessing
20 tobacco manufacturers for the costs of cigarette smoking as well as
21 regulating their conduct to the extent that they were sued and agreed to
22 resolve that suit through settlement." *Id.* at 354 (citation omitted).
23
24

25 Additionally, the Court notes there are a number of cases that have
26 upheld the Master Settlement Agreement and the escrow statutes as

1 legitimate, non-discriminatory legislation. E.g., *Grand River Enterprises*
2 *Six Nations, Ltd. v. Beebe*, 574 F.3d 929, (8th Cir. 2009), cert. denied,
3 130 S. Ct. 2095 (2010) (rejecting challenges to Master Settlement
4 Agreement and Escrow statutes on grounds of antitrust, commerce clause,
5 equal protection and procedural due process grounds); *Grand River*
6 *Enterprises Six Nations, Ltd. v. Pryor*, 481 F.3d 60 (2d Cir. 2007);
7 (upholding denial of preliminary injunction to state's enforcing the
8 escrow statutes); *Sanders v. Brown*, 504 F.3d 903 (9th Cir. 2007)
9 (rejecting anti-trust challenges to Master Settlement Agreement escrow
10 statutes).
11

12 VII. CONCLUSION

13 Based on the finding above that the finished cigarettes and
14 roll-your-own tobacco are not directly derived from trust land, King
15 Mountain can prove no set of facts in support of the claim that
16 Washington's escrow statutes are in conflict with the Treaty or federal
17 law which would entitle Plaintiffs to relief. Escrow is required for all
18 non-exempt sales subject to the State's cigarette taxes, regardless
19 whether those sales occur on or off the reservation. Escrow is not
20 required for tax exempt King Mountain sales of cigarettes purchased
21 directly by enrolled members of federally recognized Indian tribes from
22 an Indian tribal jurisdiction of the member's tribe for the member's own
23 use. If there were any past sales that were exempt from state excise
24 tax, but for which King Mountain has deposited money into escrow anyway,
25 King Mountain has failed to offer evidence in support of a refund claim
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1 and the court expresses no opinion concerning the same. Accordingly,
2 King Mountain, a NPM, is required to comply with the escrow statute for
3 all past and future sales deemed "units sold."

4 **IT IS ORDERED:**

5 1. Plaintiffs' Motion For Summary Judgment, **ECF No. 85**, is **DENIED**.

6 2. Defendant's Motion For Summary Judgment, **ECF No. 90**, is **GRANTED**.

7 3. Defendant's Motion to Strike Plaintiffs' New Legal Theory and
8 Related Factual Submission, **ECF No. 107**, is **GRANTED in part**.
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10 4. Plaintiff's Motion to Strike Reports and Exclude Testimony of
11 Emily Greenwald, **ECF No. 74**, is **DENIED as MOOT**.

12 The District Court Executive is directed to enter this Order and
13 enter judgment consistent herewith.

14 **DATED** this 5th day of April, 2013.

15 ***s/Lonny R. Suko***

16 _____
17 LONNY R. SUKO
18 UNITED STATES DISTRICT JUDGE
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